



**ASIC**

Australian Securities & Investments Commission

CONSULTATION PAPER 283

# Remaking ASIC class order on credit union member shares: [CO 02/1176]

May 2017

## About this paper

This consultation paper sets out ASIC's proposals to remake our class order on credit union member shares. Under the *Legislation Act 2003*, this class order will expire ('sunset') if not remade.

We are seeking feedback from the credit union industry, and mutual banks that previously operated as credit unions, on our proposal to remake, without significant changes, Class Order [CO 02/1176] *Credit union member shares*, which is due to expire on 1 April 2018.

Note: The draft ASIC instrument is available on our website at [www.asic.gov.au/cp](http://www.asic.gov.au/cp) under CP 283.

### About ASIC regulatory documents

In administering legislation ASIC issues the following types of regulatory documents.

**Consultation papers:** seek feedback from stakeholders on matters ASIC is considering, such as proposed relief or proposed regulatory guidance.

**Regulatory guides:** give guidance to regulated entities by:

- explaining when and how ASIC will exercise specific powers under legislation (primarily the Corporations Act)
- explaining how ASIC interprets the law
- describing the principles underlying ASIC's approach
- giving practical guidance (e.g. describing the steps of a process such as applying for a licence or giving practical examples of how regulated entities may decide to meet their obligations).

**Information sheets:** provide concise guidance on a specific process or compliance issue or an overview of detailed guidance.

**Reports:** describe ASIC compliance or relief activity or the results of a research project.

### Document history

This paper was issued on 25 May 2017 and is based on the Corporations Act as at the date of issue.

### Disclaimer

The proposals, explanations and examples in this paper do not constitute legal advice. They are also at a preliminary stage only. Our conclusions and views may change as a result of the comments we receive or as other circumstances change.

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# The consultation process

## Making a submission

You may choose to remain anonymous or use an alias when making a submission. However, if you do remain anonymous we will not be able to contact you to discuss your submission should we need to.

Please note we will not treat your submission as confidential unless you specifically request that we treat the whole or part of it (such as any personal or financial information) as confidential.

Please refer to our privacy policy at [www.asic.gov.au/privacy](http://www.asic.gov.au/privacy) for more information about how we handle personal information, your rights to seek access to and correct personal information, and your right to complain about breaches of privacy by ASIC.

Comments should be sent by 23 June 2017 to:

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## What will happen next?

<b>Stage 1</b>	25 May 2017	ASIC consultation paper released
<b>Stage 2</b>	23 June 2017	Comments due on the consultation paper
<b>Stage 3</b>	July–August 2017	Commencement of remade instrument

## A Background

### Key points

Legislative instruments, such as class orders, are repealed automatically, or 'sunset', after 10 years, unless action is taken to exempt or preserve them. We will consult on all sunseting legislative instruments that have more than a minor or machinery regulatory impact.

### Purpose of 'sunseting' legislative instruments

- 1 Under the *Legislation Act 2003*, legislative instruments cease automatically, or 'sunset', after 10 years, unless action is taken to exempt or preserve them. Section 50(1) repeals a legislative instrument on either 1 April or 1 October—whichever date occurs first on or after the 10th anniversary of its registration on the Federal Register of Legislation (FRL). Repeal does not undo the past effect of the instrument.
- 2 To preserve its effect, a legislative instrument, such as a class order, must be remade before the sunset date. The purpose of sunseting is to ensure that instruments are kept up to date and only remain in force while they are fit for purpose.

### Our approach to remaking legislative instruments

- 3 If it is necessary to remake a legislative instrument, our focus is on making it clear and user friendly. We will also, where possible, simplify and rationalise its content and conditions. For example, we will remove or reduce an obligation or burden in a legislative instrument if we are able to do so without undermining ASIC's priorities of promoting investor and consumer trust and confidence and ensuring fair and efficient markets.
- 4 We will consult affected stakeholders on all ASIC legislative instruments that have more than a minor or machinery regulatory impact, and are subject to sunseting, to ensure:
  - (a) we carefully consider the continuing regulatory and financial impact of the instrument; and
  - (b) the instrument retains its effectiveness in addressing an identified issue or problem.
- 5 Generally, a Regulation Impact Statement (RIS) is required for new and amended policy that has a significant regulatory impact: see the [Australian Government Guide to Regulation](#). We will review, including public

consultation, all class orders that have a significant regulatory impact before the scheduled sunset date. Where our review finds that a class order is not operating effectively and efficiently, we will prepare a RIS to assess any proposed changes to the class order that are not minor and machinery. Where the class order is operating effectively and efficiently, we will remake the instrument without substantive changes.

## B Remaking ASIC class order

### Key points

We are proposing to remake Class Order [CO 02/1176] *Credit union member shares*, which sunsets on 1 April 2018.

We have formed the preliminary view that this class order is operating effectively and efficiently, and continues to form a useful part of the legislative framework.

The class order has been redrafted using ASIC's current style and format, while preserving the current effect of the instrument. The draft ASIC instrument, which reflects the minor amendments proposed in this paper, is available on our website at [www.asic.gov.au/cp](http://www.asic.gov.au/cp) under CP 283.

### Your feedback

- 6 In this section we invite you to comment on our proposal to remake [CO 02/1176], including whether the class order is currently operating effectively and efficiently. These proposals are only an indication of the approach we may take and are not our final policy.

## Class Order [CO 02/1176] *Credit union member shares*

### Background

- 7 Before 1 July 1999 credit unions (and other specific types of financial institutions) were registered and regulated under the Financial Institutions Codes of each state and territory. On 1 July 1999 the registration and regulation of credit unions as financial institutions were transferred from the Financial Institutions Codes to the then Corporations Law. Credit unions, along with other specified types of financial institution that transferred to Commonwealth regulation, are referred to in the *Corporations Act 2001* (Corporations Act) as 'transferring financial institutions'.
- 8 Many transferring financial institutions are member-owned; members must acquire a share in the institution (for a fixed, nominal sum) to use the institution's services and to vote on member resolutions. These are typically known as member shares. Member shares are withdrawable on cessation of a person's membership of the institution, at which time the nominal subscription price is generally repaid.

Note: The term 'member share' is defined in reg 12.8.03(2) of the Corporations Regulations 2001.

- 9 Under Sch 4 to the Corporations Act, a transferring financial institution's withdrawable shares on issue immediately before the transfer to Commonwealth regulation were deemed to be a type of redeemable preference share. Redeemable preference shares are a financial product under the financial services provisions in Ch 7 of the Corporations Act.
- 10 As a result, the transferring financial institution would need to comply with the Australian financial services (AFS) licensing and disclosure requirements in relation to its own member shares. The characteristics of member shares are somewhat different from those of other redeemable preference shares. We made [CO 02/1176] because we considered that the application of some Ch 7 provisions to member shares would be disproportionately burdensome.
- 11 [CO 02/1176] gives a series of exemptions to transferring financial institutions that were permitted to use the expression 'credit union', 'credit society' or 'credit cooperative' when they transferred to Commonwealth regulation.
- Note: This includes transferring financial institutions that previously operated using one of those expressions but have since obtained authorisation from the Australian Prudential Regulation Authority (APRA) to operate as a mutual bank.
- 12 Specifically, [CO 02/1176] exempts transferring financial institutions from the following obligations in relation to their dealings in member shares:
- (a) the requirement to hold an AFS licence;
  - (b) the financial services disclosure requirements in Pt 7.7; and
  - (c) the requirement under s1017F to confirm transactions.
- 13 We granted the exemptions under [CO 02/1176] because of the unique nature of member shares and the circumstances in which they are offered and issued to successful applicants for membership.

## Proposal

**B1** To preserve its effect beyond the sunset date of 1 April 2018, we propose to largely continue the relief currently given by [CO 02/1176] in a new legislative instrument that reflects current drafting practice, without any significant changes: see draft ASIC Corporations (Credit Union Member Shares) Instrument 2017/XX attached to this consultation paper. You can access the current instrument at [www.legislation.gov.au](http://www.legislation.gov.au) by clicking on the following direct link: [\[CO 02/1176\]](#).

The only changes proposed are to:

- (a) remove a redundant AFS licensing exemption for issuing and redeeming member shares (see paragraphs 15–16 below);
- (b) clarify that the periodic statement (in which the company relying on the exemption must include details of the number of shares held by

the holder and the amount paid for those shares), referred to in the condition of the instrument, is that required to be given under s1017D;

- (c) update the name of the legislative instrument;
- (d) reflect current drafting practice and update the format of the current document;
- (e) simplify the drafting to give greater clarity; and
- (f) update legislative references and definitions.

### **Rationale**

- 14 We have reached the preliminary view that [CO 02/1176] is operating effectively and efficiently, and continues to form a useful part of the legislative framework. We are not aware of significant issues with the current operation of this class order.

### **Removal of unnecessary relief**

- 15 [CO 02/1176] includes an exemption from the requirement to hold an AFS licence for institutions that issue and redeem their own member shares.
- 16 However, we consider that this exemption is unlikely to be necessary because the ordinary effect of the Corporations Act is to exclude this conduct from the definition of a financial service. Section 766C(4) provides that a body corporate is taken not to be dealing in a financial product when entering into transactions that relate solely to its own securities. We are proposing to remake [CO 02/1176] without this redundant exemption.

## Key terms

Term	Meaning in this document
AFS licence	An Australian financial services licence under s913B of the Corporations Act that authorises a person who carries on a financial services business to provide financial services Note: This is a definition contained in s761A.
AFS licensee	A person who holds an AFS licence under s913B of the Corporations Act Note: This is a definition contained in s761A.
ASIC	Australian Securities and Investments Commission
Ch 7 (for example)	A chapter of the Corporations Act (in this example numbered 7), unless otherwise specified
[CO 02/1176] (for example)	An ASIC class order (in this example numbered 02/1176) Note: Legislative instruments made from 2015 are referred to as ASIC instruments.
Corporations Act	<i>Corporations Act 2001</i> , including regulations made for the purposes of that Act
Corporations Regulations	Corporations Regulations 2001
member share	A share in a body corporate, as defined in reg 12.8.03 of the Corporations Regulations
Pt 7.7 (for example)	A part of the Corporations Act (in this example numbered 7.7), unless otherwise specified
s766C (for example)	A section of the Corporations Act (in this example numbered 766C), unless otherwise specified
Sch 4 (for example)	A schedule to the Corporations Act (in this example numbered 4), unless otherwise specified
sunsetting	The practice of specifying a date at which a given regulation or legislative instrument will cease to have effect
transferring financial institution	Has the meaning given in clause 1 of Sch 4 to the Corporations Act